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# Theobald v. University of Cincinnati - Reforming Medical Malpractice in Ohio: A Survey of State Laws and Policy Impacts

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# THEOBALD V. UNIVERSITY OF CINCINNATI – REFORMING MEDICAL MALPRACTICE IN OHIO: A SURVEY OF STATE LAWS AND POLICY IMPACTS

BRIAN DUNNE\*

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## I. INTRODUCTION

In its recent decision of *Theobald v. University of Cincinnati*, Ohio’s Tenth District Court of Appeals declared that medical practitioners shall have state employee immunity, based on section 9.86 of the Ohio Revised Code, anytime they treat a patient as long as they act in a dual role to “teach” an “involved” student or resident.<sup>1</sup> This immunity takes away the patient’s right to sue the practitioner

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<sup>1</sup>See *Theobald v. Univ. of Cincinnati*, 827 N.E.2d 365, 377 (Ohio Ct. App. 2005), *aff’d*, 857 N.E.2d 573 (Ohio 2006).

personally for his medical malpractice. As required by this holding, the doctor must have an employment relationship with a state medical college.<sup>2</sup> However, the employment relationship could encompass anything from a faculty position to something as minimal as a work relationship with a private practice plan closely tied to the state medical college.<sup>3</sup>

Also, within this holding, the court held that the amount of involvement of the student or resident does not matter as long as the practitioner was “teaching” at the time of treatment.<sup>4</sup> Essentially, teaching may be satisfied as long as the student or resident observes treatment.<sup>5</sup> Finally, the court emphasized that the patient’s view of his relationship with the practitioner is completely irrelevant during an immunity determination.<sup>6</sup> Thus, private patients will not be allowed to sue physicians in their private capacity.

*Theobald* runs contrary to the established case law of Ohio at the time.<sup>7</sup> The prior law was clear that practitioners receive immunity when treating a patient of the state or supervising another’s treatment of a patient.<sup>8</sup> Moreover, when *Theobald* is compared to other jurisdictions’ immunity grants, Ohio appears to be an extreme outlier.<sup>9</sup> And even when Ohio is compared to those states with nearly identical immunity statutes, *Theobald* still does not meet conventional jurisprudence.<sup>10</sup>

Finally, not only is it difficult to justify the decision through precedent or conventional wisdom among the several states, but there are also harsh practical effects that make any policy justification unreasonable. First, a plaintiff’s primary forum, in a *Theobald*-like case, has now been changed from the Court of Common Pleas to the Court of Claims.<sup>11</sup> Second, with the grant of immunity, the state shall be liable for all damages, but statutory limitations allow much less recovery against the state than against private medical practitioners.<sup>12</sup> These limitations result from the inflexibility of the cap on damages against the state, which does not provide for cap

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<sup>2</sup>*Id.* at 372.

<sup>3</sup>*Id.* at 372-74. The nurse in this case was held to be an employee of the state since she worked with a practice plan that contributed funds to the college of nursing and the dean of the college had a certain extent of control over the funds.

<sup>4</sup>*Id.* at 377.

<sup>5</sup>*Id.* One can infer that the court intends teaching to include practicing medicine with a student observing from its statement: “[s]tudents and residents then benefit from working with these clinical faculty members, learning to practice medicine by *observing* and assisting them in the treatment of patients.” *Id.* at 375. (emphasis added). One may also draw this inference from the general tone of the opinion and the promotion of the University of Cincinnati’s interest in educating students.

<sup>6</sup>*Id.* at 377.

<sup>7</sup>See *infra* Part III.

<sup>8</sup>See *id.*

<sup>9</sup>See *infra* Part IV.

<sup>10</sup>See *id.*

<sup>11</sup>See *infra* Part V.A.

<sup>12</sup>See *infra* Part V.B.

exceptions due to deformity, loss of limb, or loss of bodily organ system. Third, *Theobald* gives state related practitioners less of an economic incentive to follow the standard of care than it does to private physicians, consequently devaluing medical service markets.<sup>13</sup>

Part II of this article discusses how the case of *Theobald* developed and how the Tenth District came to its ultimate conclusion that dual agent medical practitioners should receive immunity. Part III addresses Ohio's prior case law leading up to the *Theobald* decision. Part IV compares the Ohio immunity statute, section 9.86 of the Ohio Revised Code and the *Theobald* outcome to similar statutes and restatements of other states and their ultimate rules on dual agent immunity. Part V discusses the practical effects of *Theobald*, including the change of forum, new limitation on damages, and economic effects on the medical service market.

*Theobald* was upheld in law and fact by the Supreme Court of Ohio on December 13, 2006.<sup>14</sup> However, since the Tenth District Court of Appeals has issued all the pertinent case law on this matter, and the Supreme Court of Ohio simply affirmed the reasoning, this article shall discuss the Court of Appeals' decision and not the Supreme Court's.

## II. *THEOBALD V. UNIVERSITY OF CINCINNATI*

### A. *Theobald's Facts*

*Theobald* began with a patient of the University of Cincinnati's University Hospital alleging inadequate medical care, which resulted in blindness and lack of mobility in his arms.<sup>15</sup> Mr. Theobald, a plaintiff and the victim in this case, arrived at the hospital in serious condition after a multi-car collision.<sup>16</sup> Soon after arrival, the hospital staff identified his injuries and initially ascertained that surgery was necessary.<sup>17</sup>

The practitioners, however, waited until the following day to perform more tests to ensure surgery was, in fact, required.<sup>18</sup> Due to Mr. Theobald's extensive spinal injury, surgery would be seriously complicated.<sup>19</sup> The next day's examinations and x-rays confirmed that he would need an operation, and that evening the medical team performed surgery.<sup>20</sup> Three residents and a student assisted in or observed the treatment administered to Mr. Theobald at some point during the two days.<sup>21</sup> The

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<sup>13</sup>See *infra* Part V.C.

<sup>14</sup>*Theobald v. Univ. of Cincinnati*, 857 N.E.2d 573 (Ohio 2006).

<sup>15</sup>*Theobald v. Univ. of Cincinnati*, 827 N.E.2d 365, 368-70 (Ohio Ct. App. 2005), *aff'd*, 857 N.E.2d 573 (Ohio 2006).

<sup>16</sup>*Id.* at 368-69.

<sup>17</sup>*Id.* at 368.

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

<sup>20</sup>*Id.*

<sup>21</sup>*Id.* at 377.

plaintiffs' claim was that subsequent to the operation Mr. Theobald went blind and lost all mobility of his arms.<sup>22</sup>

*B. Theobald's Posture*

A year later, Mr. and Mrs. Theobald brought suit against the hospital and the four key medical practitioners that performed his operation.<sup>23</sup> The group of four defendants included three doctors who worked for the University of Cincinnati [*hereinafter* UC] part-time and one nurse who volunteered as a part-time clinical instructor at the university.<sup>24</sup> All four, however, also work professionally in private practice plans,<sup>25</sup> which paid them individually for Mr. Theobald's treatment.<sup>26</sup>

Mr. and Mrs. Theobald filed suit in the Court of Claims against UC, a state actor.<sup>27</sup> The four medical practitioners were also joined in the suit since they asserted immunity under section 9.86 of the Ohio Revised Code. This section of the statute grants the employees and officers of the State of Ohio full immunity from civil liability when acting within the scope of their employment, unless the officer or employee acted with "malicious purpose, in bad faith, or in a wanton or reckless manner."<sup>28</sup> Therefore, before granting immunity a court must decide "(1) that the person is a state officer or employee, and (2) that the officer or employee was acting within his scope of employment and without malicious purpose, in bad faith or in a wanton or reckless manner."<sup>29</sup> Further, a court must assess whether the overriding interests of another severs the scope of employment for one who would otherwise be considered an employee of the state.<sup>30</sup>

Procedurally, anytime there is a question of whether a person should receive state employee immunity under section 9.86, a plaintiff must proceed to the Court of Claims, which hears claims against the State, for an immunity determination.<sup>31</sup> If the immunity is determined to be proper, the plaintiff's only claim exists against the state, which waives sovereign immunity for actions of state employees who receive

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<sup>22</sup>*Id.* at 368-69.

<sup>23</sup>*Id.* at 369. No claim was brought against the students or residents.

<sup>24</sup>*Id.* at 372-73.

<sup>25</sup>Private practice plans or groups are companies formed by medical practitioners who are contracted out to private patients rather than patients of the State.

<sup>26</sup>*Id.* at 372-73.

<sup>27</sup>*Id.* at 369. The Court of Claims is the proper court in Ohio to bring a suit against the State.

<sup>28</sup>OHIO REV. CODE ANN. § 9.86 (LexisNexis 2006).

<sup>29</sup>*Theobald*, 827 N.E.2d at 372.

<sup>30</sup>*See* Katko v. Balcerzak, 536 N.E.2d 10, 14 (Ohio Ct. App. 1987) *superseded on other grounds by* Lautner v. Russell, No. 1-90-99, 1991 Ohio App. LEXIS 4650 (Ohio Ct. App. Sept. 24, 1991); Balson v. Ohio State Univ., 677 N.E.2d 1216, 1222 (Ohio Ct. App. 1996).

<sup>31</sup>OHIO REV. CODE ANN. § 2743.02(F) (LexisNexis 2006).

section 9.86 immunity.<sup>32</sup> If immunity does not exist, then the cause of action will proceed to the Court of Common Pleas.<sup>33</sup>

Accordingly, the Court of Claims held an immunity determination of whether the medical practitioners were employees of the state and acting in the scope of employment of UC.<sup>34</sup> In its decision, the Court of Claims ruled that only two of the medical practitioners were employees of the state and none were within the scope of state employment.<sup>35</sup>

After appeals on a separate issue, UC appealed the ruling of the Court of Claims as to state employee status.<sup>36</sup> The Tenth District Court of Appeals heard the appeal and ultimately reversed the lower court's decision.<sup>37</sup> The Supreme Court of Ohio heard a final appeal by the Theobalds but ultimately affirmed the appellate court's holding in both law and fact.<sup>38</sup>

### C. Theobald's *Opinion and Holding*

The Tenth District first considered whether the doctors and nurse qualified as state employees. Since the Court of Claims held that two of the doctors met the requirement for state employment, the Tenth District needed only to decide if the third doctor and the nurse were state employees.<sup>39</sup> The court concluded that the doctor was a state employee since he had worked for the UC as an assistant professor.<sup>40</sup>

The court focused much more on whether the nurse was a state employee, because the nurse's employment relationship with UC was only as a volunteer clinical instructor.<sup>41</sup> She received no compensation for her work from UC. Instead, she was gainfully employed by a private practice plan which had a working relationship with UC.<sup>42</sup> Particularly, the private practice plan provided funds for UC's anesthesia department, and UC maintained checks on the practice plan's budgetary concerns.<sup>43</sup> The court ultimately decided that the relationship between the

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<sup>32</sup>§ 2743.02(A)(1).

<sup>33</sup>OHIO REV. CODE ANN. § 2305.01 (LexisNexis 2006). Court of Common Pleas has general jurisdiction for all cases where there is no immunity. Therefore, the Court of Common Pleas retains jurisdiction over actions against an individual and not the State.

<sup>34</sup>*Theobald*, 827 N.E.2d at 369. The suit against the medical professionals was filed in the Court of Common Pleas, but the Court of Claims joined them for determination.

<sup>35</sup>*Id.* at 369-70.

<sup>36</sup>*Id.* at 370.

<sup>37</sup>*Id.* at 378.

<sup>38</sup>*Theobald v. Univ. of Cincinnati*, 857 N.E.2d 573 (Ohio 2006).

<sup>39</sup>*Theobald v. Univ. of Cincinnati*, 827 N.E.2d 365, 369-70 (Ohio Ct. App. 2005), *aff'd*, 857 N.E.2d 573 (Ohio 2006).

<sup>40</sup>*Id.* at 372-73.

<sup>41</sup>*Id.* at 373.

<sup>42</sup>*Id.*

<sup>43</sup>*Id.*

private employer and UC was “sufficiently close,” in spite of being separate legal entities; thus, the nurse was considered a state employee for immunity purposes.<sup>44</sup>

Next, the court discussed the case’s main issue: whether the medical practitioners acted within the *scope of their employment* during the surgery that led to the cause of action. The court began by stating the general rule that “conduct is within the scope of employment if it is initiated, in part, to further or promote the master’s business.”<sup>45</sup> Thus, the court had to find enough state interest in the treatment of Mr. Theobald to find immunity.<sup>46</sup>

The court analysis examined “scope of employment” by looking to the history of the doctrine. It started with a traditional test that emphasized the “financial factor” of the scope of employment.<sup>47</sup> This financial factor places the medical practitioner in the scope of employment of the party – practice plan or state entity – which collects money from the patient and pays the medical practitioner.<sup>48</sup> If the court only applied financial factor testing in *Theobald*, all of the medical professionals involved would be outside the scope of state employment since the private practice plans collected fees from Mr. Theobald and paid them for the medical services rendered.<sup>49</sup>

The court’s discussion then moved on to the education factor, which developed over the prior nine years as a counterpoint to the financial factor test. The education factor maintains that a university, in this case UC, has an interest in students and residents assisting in and observing a patient’s treatment because such involvement creates a valuable learning experience that would not otherwise be available.<sup>50</sup> Additionally, the state has an interest in educational funding, which is partially provided by the private practice plans of medical practitioners.<sup>51</sup> The court applied the education earlier in the decision of employee status for the nurse, where the funding of the medical school by the nurse’s practice plan and their intertwinement, created an effective employment between the nurse and UC.<sup>52</sup>

After presenting these two opposing factors, the court then created new precedent by effectively removing the financial factor from any analysis of “within the scope of employment” for immunity purposes, leaving education as the only guiding factor. The court stated:

[W]e conclude that although the financial factors may be relevant to determine whether a practitioner is an employee of the state, the *financial factors* generally have *little bearing* upon whether a practitioner is acting

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<sup>44</sup>*Id.*

<sup>45</sup>*Id.* at 374. (citing *Patena v. Univ. of Akron*, No. 01AP-845, 2002 Ohio App. LEXIS 1701, at \*8 (Ohio Ct. App. Apr. 18, 2002)).

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

<sup>49</sup>*Id.*

<sup>50</sup>*Id.* at 375.

<sup>51</sup>*Id.* These practice plans are related to the medical college and give it a share of the proceeds from private medical procedures. *Id.*

<sup>52</sup>*See supra* Part II.C.

*within the scope* of his employment. . . . Because the state's interest is promoted no matter how the education of the student or resident occurs, a *practitioner is acting within the scope of his employment* if he educates a student or resident by *direct instruction, demonstration, supervision, or simple involvement* of the student or resident in the patient's care.<sup>53</sup>

Within this context, the court held a student's or resident's amount of involvement does not matter as long as the practitioner was teaching at the time of treatment.<sup>54</sup> Essentially, teaching may be satisfied as long as the student or resident observes treatment.<sup>55</sup> Finally, the court stated that in an immunity determination, the patient's view of his relationship with the practitioner is completely irrelevant.<sup>56</sup>

Thus, the appellate court overruled the Court of Claim, set new precedent, and remanded the case for a determination of whether students or residents were involved in each aspect of Mr. Theobald's treatment so each defendant's immunity could be properly decided.<sup>57</sup>

### III. HISTORY OF MEDICAL PRACTITIONER-STATE EMPLOYEE IMMUNITY CASE LAW

It is important to look at the history of physician immunity since a major reason for the *Theobald* court's holding was the continued progression to granting broader immunity for these physicians. Also, it is important to keep in mind the question of whether *Theobald* follows the continued "progress" or sharply changes the direction of Ohio physician immunity law in terms of acting "within the scope" of employment. Further, since the Tenth District is the appellate court to the Court of Claims, it is the only court that has proper authority to review decisions of immunity. And given that the Supreme Court of Ohio has yet to address the issue of physician-state employee immunity in dual agency, the Tenth District has been the ultimate authority on the matter.

The Tenth District cited *Katko v. Balcerzak* as the first case discussing the issue of medical practitioner-state employee immunity due to involvement with a State of Ohio-operated medical college.<sup>58</sup> In *Katko*, a private patient's estate brought a malpractice suit against a physician who treated the decedent at the Ohio State University Hospital.<sup>59</sup> While the case did not specifically mention any teaching during the treatment of the patient, teaching was part of the doctor's job description with the Ohio State University, and the court found the line between "when teaching stops and patient care picks up" to be blurry at best.<sup>60</sup> The court remanded the case

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<sup>53</sup>*Theobald*, 827 N.E.2d at 377 (emphasis added).

<sup>54</sup>*Id.*

<sup>55</sup>*Id.*

<sup>56</sup>*Id.* at 378.

<sup>57</sup>*Id.*

<sup>58</sup>*Katko v. Balcerzak*, 536 N.E.2d 10, 14 (Ohio Ct. App. 1987) (*Katko* is the oldest case that the author found discussing medical practitioner-state employee immunity due to involvement with a State of Ohio-operated medical college.).

<sup>59</sup>*Id.* at 11.

<sup>60</sup>*Id.* at 14.



for a factual determination as to whether the doctor in rendering services to a private patient was acting as an individual physician or as an employee of the university.<sup>61</sup> The court also discussed the fact that the Ohio State University did not receive any payment from the services provided by the defendant physician, but the court never expanded on the effect a receipt of funds by the university would have on the outcome of the case.<sup>62</sup>

The next case on appeal to the Tenth District was *Latham v. Ohio State University Hospital*.<sup>63</sup> In *Latham*, the court considered whether an emergency room attending physician could be considered an employee of the Ohio State University Hospital, for state liability purposes, when he is contracted for hospital work through a private corporation but also acts as an assistant clinical professor.<sup>64</sup> The court omitted any mention of teaching or instructing residents or students during treatment of the decedent in the case. Instead, the court primarily discussed the doctrine of respondeat superior and whether the hospital had the appropriate control to be held liable for the physician's actions.<sup>65</sup> After a brief review of the facts,<sup>66</sup> including emergency room procedures set by the Ohio State University Hospital, the court held it could not "find in the record any evidence showing that the procedures used in the emergency room by the attending physician were set up by appellee so that appellee could control the mode and manner of the work involved."<sup>67</sup> Thus, the court held the hospital lacked sufficient control to find state employee status.

Five years after *Latham*, the Tenth District heard *York v. University of Cincinnati Medical Center*.<sup>68</sup> Again, in this case, a physician who worked as a professor for a state-operated medical school claimed to be immune from suit due to state employee status.<sup>69</sup> And again, the court failed to mention any specific teaching with the treatment of plaintiff's decedent.<sup>70</sup> But unlike others before it, this defendant physician's practice plan provided two percent of the fee for medical services to the

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<sup>61</sup>*Id.*

<sup>62</sup>*Id.*

<sup>63</sup>*Latham v. Ohio State Univ. Hosp.*, 594 N.E.2d 1077 (Ohio Ct. App. 1991).

<sup>64</sup>*Id.* at 1079.

<sup>65</sup>*Id.*

<sup>66</sup>The facts included the following:

The attending physician at the emergency room (1) held the title of Assistant Clinical Professor in the Department of Emergency Medicine at the Ohio State University, (2) received payment from appellee for his services in the form of benefits such as football tickets and the use of appellee's facilities, and (3) used procedures in the emergency room that were set up by appellee.

*Id.*

<sup>67</sup>*Id.*

<sup>68</sup>*York v. Univ. of Cincinnati Med. Ctr.*, No. 95API09-1117, 1996 Ohio App. LEXIS 1682 (Ohio Ct. App. Apr. 23, 1996).

<sup>69</sup>*Id.* at \*1-2.

<sup>70</sup>However, it was the purpose of the defendant physician's practice group to "carry out and support the clinical practice and teaching functions of the Department." *Id.* at \*4.

University of Cincinnati. The court, however, still proceeded to a relationship of control, stating “an employment relationship will be found to exist only when one party exercises the right to control the actions of another, and those actions are directed toward an objective which the former seeks.”<sup>71</sup> The court found that the physician was not performing any duty under the control of UC when he treated the plaintiff’s decedent; therefore, the duties performed fell outside the scope of employment, and the physician did not have state-employee immunity.<sup>72</sup>

Months after *York*, the Tenth District heard *Balson v. Ohio State University*.<sup>73</sup> *Balson* contains enough facts to determine a compelling likeness to *Theobald*, more so than any other case to this point. Like *Theobald*, the physician in the case treated a *private patient*, plaintiff’s decedent, with the *assistance of a resident*.<sup>74</sup> Also, the physician held the position of assistant professor at the Ohio State University.<sup>75</sup> Additionally, the physician worked for a private practice group which was formed at the university’s behest and contributed a percentage of its earnings to the medical university.<sup>76</sup> Unlike *Theobald*, however, based on the precedent of *Katko* and *York*, the court concluded that the physician treated the patient in his private capacity, “albeit ‘in connection with his employment’ at OSU.”<sup>77</sup> Therefore, those actions were explicitly outside the physician’s scope of employment.

The next case to come up on appeal, *Norman v. Ohio State University Hospital*,<sup>78</sup> has a special significance to this article since the *Theobald* court cited it as the case first setting out the “education factor.”<sup>79</sup> *Norman* dealt with a physician, like in previous cases, working for a state university medical school and a private practice plan.<sup>80</sup> Here, the physician’s duties under his university employment included remaining on call for the clinic provided by the university hospital to supervise residents.<sup>81</sup> In this case, the plaintiff’s decedent was a patient who made reoccurring

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<sup>71</sup>*Id.* (citing *Hanson v. Kynast*, 494 N.E.2d 1091 (Ohio 1986)). *Hanson* factors for determining control include: (1) whether the individual is performing in the course of the principal’s business rather than in some ancillary capacity; (2) whether the principal provided the materials and place of work; (3) whether the individual offers his services to the public at large or to one individual at a time; (4) the length of employment; (5) the right to terminate the employee at will; and (6) whether the individual was receiving compensation from the principal. *Hanson*, 494 N.E.2d at 1095, 1095 n.5.

<sup>72</sup>*York*, 1996 Ohio App. LEXIS 1682, at \*5.

<sup>73</sup>*Balson v. Ohio State Univ.*, 677 N.E.2d 1216 (Ohio Ct. App. 1996).

<sup>74</sup>*Id.* at 1217. The court stated that the patient was billed for work performed by a resident. *Id.* at 1219. This is quite important since it is the first time the Tenth District discusses students or residents being involved with treatment in question for an immunity determination.

<sup>75</sup>*Id.* at 1220.

<sup>76</sup>*Id.* at 1218, 1220.

<sup>77</sup>*Id.* at 1222.

<sup>78</sup>*Norman v. Ohio State Univ. Hosp.*, 686 N.E.2d 1146 (Ohio Ct. App. 1996).

<sup>79</sup>*Theobald v. Univ. of Cincinnati*, 827 N.E.2d 365, 375 (Ohio Ct. App. 2005).

<sup>80</sup>*Norman*, 686 N.E.2d at 1150-51.

<sup>81</sup>*Id.* at 1150.

visits to the clinic but had only been treated by the defendant physician the time in question; thus, the court believed that the decedent was not a private patient but rather a patient of the university.<sup>82</sup>

The court suggested that the lack of a private patient-doctor relationship distinguished *Norman* from prior case law, which led to the grant of state employee immunity to the defendant physician.<sup>83</sup> Further, the fact that the university kept 70 percent of the fees for the defendant's services, the physician only received 30 percent, and the physician's private practice plan was entirely circumvented in the collection and distribution process all influenced the court.<sup>84</sup> And contrary to *Theobald's* representation, the court did not discuss any educational benefits the university received from the physician's services.

*Chitwood v. University Medical Center* adopted the rule from *Norman*. In *Chitwood*, the defendant physician received immunity for treating a patient billed by the physician's private practice plan since both parties had stipulated the defendant physician was within the scope of his employment with the university.<sup>85</sup> The court stated soon after in *Scarberry v. Ohio State University Hospitals* that:

[T]he university admitted in its answer and the parties had stipulated that the physician was acting within the scope of his employment with the university when he rendered care to the patient. The only legal conclusion that could be drawn from such stipulation was that the physician was entitled to immunity.<sup>86</sup>

Thus, the stipulation by the parties was the only reason why the physician in *Chitwood* received immunity.

After the appellate court decided *Chitwood*, the case of *Kaiser v. Flege* reaffirmed the Pre-*Chitwood* rule of *Norman*. The two major determining factors to be used in finding whether a physician acted outside the scope of his or her employment for a state university hospital are: "(1) whether the patient was a private patient of the physician, rather than a patient of the university; and (2) the

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<sup>82</sup>*Id.* at 1151.

<sup>83</sup>*Id.* The *Norman* court stated "[o]ne of the determining factors in finding that the physicians in *Katko*, *York*, *Balson* and *Harrison* acted outside the scope of their employment was that the patients therein were private patients of the physicians, rather than patients of the universities." *Id.* (emphasis added).

<sup>84</sup>*Id.*

<sup>85</sup>*Chitwood v. Univ. Med. Ctr.*, No. 97API09-1235, 1998 Ohio App. LEXIS 2106, at \*6 (Ohio Ct. App. May 5, 1998).

<sup>86</sup>*Scarberry v. Ohio State Univ. Hosp.*, No. 98AP-143, 1998 Ohio App. LEXIS 5649, at \*14 (Ohio Ct. App. Dec. 3, 1998) (emphasis added). In *Scarberry*, the court found that the defendant physician treated a patient, never said to have been a private patient, under his duties to train and supervise residents and only in connection with his services to the state university. *Id.* at \*17-19. Additionally, the physician's private practice billed the patient \$151 for his services while the Ohio State University hospital billed the patient \$151,358.78. See also *Ferguson v. Ohio State Univ. Med. Ctr.*, No. 98AP-863, 1999 Ohio App. LEXIS 2828, at \*9 (Ohio Ct. App. June 22, 1999).

university's financial gain from the medical treatment at issue relative to the physician's financial gain therefrom.”<sup>87</sup>

*Kaiser* is similar to previous cases. In *Kaiser*, a doctor treated plaintiff's decedent as a private patient and received payment through his private practice plan rather than the UC Medical Center, the university facility with which this defendant was affiliated.<sup>88</sup> It was well agreed upon in this case that any teaching that may have occurred during the treatment, such as instruction of residents or students, was wholly “incidental” to the actual treatment.<sup>89</sup> The court found that since plaintiff's decedent was a private patient of the defendant and the university's financial gain was minimal compared to that of the physician, the physician was not entitled to state employee immunity.<sup>90</sup>

After *Kaiser*, the Tenth District heard a series of cases in which it expanded the scope of immunity for those physicians who merely supervised, within the scope of their employment with the state, the treatment of patients by residents.<sup>91</sup> Because these cases mostly involve emergency room situations, they are distinguished from those cases determining whether a physician acts within the scope of employment.<sup>92</sup>

The first of these cases, *Ferguson*, dealt with a physician who did not meet with the patient, but merely discussed the treatment with the treating resident.<sup>93</sup> In the next case, *Hopper*, the court found that even though multiple physicians were present for each stage of decedent's treatment, and a private practice plan billed decedent, residents treated the decedent; therefore, the physicians acted within the scope of employment with the state.<sup>94</sup>

The court then heard *Kaiser II* in which a resident treated a patient under the supervision of an attending physician.<sup>95</sup> The attending physician saw the patient for only four minutes.<sup>96</sup> The court ruled that even though the physician made the final determination of admittance or release over the patient, his essential capacity was a supervisory role, conducted within the scope of his employment with the state.<sup>97</sup> The last of these cases, *Barkan*, reiterated the rule of *Kaiser II*:

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<sup>87</sup>*Kaiser v. Flege*, No. 98AP-146, 1998 Ohio App. LEXIS 4458, at \*5 (Ohio Ct. App. Sept. 22, 1998).

<sup>88</sup>*Id.* at \*2, \*6-9.

<sup>89</sup>*Id.* at \*8.

<sup>90</sup>*Id.* at \*9.

<sup>91</sup>*Ferguson*, 1999 Ohio App. LEXIS 2828; *Hopper v. Univ. of Cincinnati*, No. 99AP-787, 2000 Ohio App. LEXIS 3456 (Ohio Ct. App. Aug. 3, 2000); *Kaiser v. Ohio State Univ.*, No. 02AP-316, 2002, Ohio App. LEXIS 5848 (Ohio Ct. App. Nov. 5, 2002); *Barkan v. Ohio State Univ.*, No. 02AP-436, 2003 Ohio App. LEXIS 928 (Ohio Ct. App. Mar. 6, 2003).

<sup>92</sup>*Barkan*, 2003 Ohio App. LEXIS 928, at \*5-6.

<sup>93</sup>*Ferguson*, 1999 Ohio App. LEXIS 2828, at \*5-6.

<sup>94</sup>*Hopper*, 2000 Ohio App. LEXIS 3456, at \*1-4, \*10.

<sup>95</sup>*Kaiser*, 2002 Ohio App. LEXIS 5848, at \*10.

<sup>96</sup>*Id.*

<sup>97</sup>*Id.* at \*3.

Although these cases identify and discuss a variety of different factors relevant to an immunity determination, the key factor in this determination is whether the patient was essentially the doctor's private patient or whether the doctor treated the patient in his or her capacity as an attending physician supervising residents.<sup>98</sup>

*Barkan* also involved an attending physician who briefly examined the patient after an initial examination by a resident. The court again found that since the resident undertook the decedent as a patient, and the physician merely supervised the treatment, the physician had acted within his scope of employment with the state.<sup>99</sup>

The key fact in all of these cases is that the residents treated the patients, the attending physicians did not. Another significant factor is that most of the cases dealt with emergency room patients being treated immediately.<sup>100</sup> The court held that an emergency room situation is a distinguishing factor in the immunity discussion since the patient is really a patient of the state rather than any specific doctor.<sup>101</sup> In this case the patient is not referred to a specific physician, but ends up with an attending physician who is on call for the evening by chance. Also, the admission of a patient to a hospital effectively forms an agency relationship between the doctor and hospital imputing liability to the hospital for the physician's actions since the patient relies on the hospital for treatment.<sup>102</sup> This concept could easily transfer to physician immunity in the emergency room context since an emergency room patient relies on the hospital for treatment rather than some specific physician.

Finally, in 2001, during the middle of the previous series of cases, the case of *Smith v. University of Cincinnati* came before the court.<sup>103</sup> In *Smith*, the court determined whether a physician who operated on a patient with a surgery resident present acted within the scope of employment with the state.<sup>104</sup> In making its determination, the court did not consider any "education factor," but it primarily considered the financial aspects of the case.<sup>105</sup> It found that since the physician's

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<sup>98</sup>*Barkan v. Ohio State Univ.*, No. 02AP-436, 2003 Ohio App. LEXIS 928, at \*5 (Ohio Ct. App. Mar. 6, 2003).

<sup>99</sup>*Id.* at \* 12.

<sup>100</sup>*Hopper v. Univ. of Cincinnati*, No. 99AP-787, 2000 Ohio App. LEXIS 3456 (Ohio Ct. App. Aug. 3, 2000).

<sup>101</sup>*Barkan*, 2003 Ohio App. LEXIS 928, at \*5-6.

<sup>102</sup>The Supreme Court of Ohio stated:

A hospital may be held liable under the doctrine of agency by estoppel for the negligence of independent medical practitioners practicing in the hospital when: (1) it holds itself out to the public as a provider of medical services; and (2) in the absence of notice or knowledge to the contrary, the patient looks to the hospital, as opposed to the individual practitioner, to provide competent medical care.

*Clark v. Southview Hosp. & Family Health Ctr.*, 628 N.E.2d 46, Syllabus of the Court (Ohio 1994).

<sup>103</sup>*Smith v. Univ. of Cincinnati*, No. 01AP-404, 2001 Ohio App. LEXIS 5271 (Ohio Ct. App. Nov. 29, 2001).

<sup>104</sup>*Id.* at \*1.

private practice plan directed all payments he had acted outside the scope of his employment with the state in treating the patient.<sup>106</sup>

When viewed in its entirety, the history of physician immunity, and more importantly, the determinative factors of acting “within the scope” of employment, takes a sharp turn in *Theobald*. The Tenth District did not rely on any precedent that would objectively lead to the blanket holding in *Theobald* that any physician performing a teaching function while operating should be immune for the educational benefit provided to the state. Instead, the precedent is clear that physicians are immune *only* when supervising and/or guiding a *resident’s treatment* of a patient or when a patient is a *patient of the state* hospital rather than the physician himself. Therefore, *Theobald* created new law, rewriting section 9.86 immunity to grant much broader immunity to practitioners involved with the education of students and residents and, thus, produced a judicial reform of medical malpractice.

#### IV. COMPARING *THEOBALD* TO OTHER JURISDICTIONS

Since the *Theobald* court based its holding on section 9.86 of the Ohio Revised Code, the state employee immunity statute, it is quite helpful to compare Ohio’s governing statute and governing law of other jurisdictions to show the similarity or differences in judicial application. A survey was conducted of eighteen states, including Ohio, recording each state’s governing law and the subsequent applicable rule of immunity, formed through judicial interpretation, on whether physicians receive immunity when a student or resident is merely involved in the physician’s treatment of a private patient, such as in *Theobald*.<sup>107</sup> This situation is distinguished from circumstances where a student or resident treats a patient under the supervision of the physician, or a patient is treated as a patient of a hospital rather than of the physician himself.

The governing laws for state employee immunity are broken into three categories: Common Law, General Statutes on State Employee Immunity, and Specific Statutes on State Employee Immunity.<sup>108</sup> Specific statutes are distinguished from general statutes by some specific requirement for state employee immunity such as an employee must perform discretionary governmental functions, an employee cannot personally profit from his or her actions, or, more applicable in this case, an employee doctor must not treat a patient at the time in question.<sup>109</sup>

The rules formed through judicial interpretations and applications make up three categories: Outside Scope of State Employment, Case-By-Case Determination of Within/Outside Scope, and Within Scope of State Employment. The “Case-By-Case” rule allows for factual determinations of immunity, decided either by trial

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<sup>105</sup>*Id.* at \*16. The court also considered that the procedure was performed in a private hospital, but it did not appear to have as much weight as the financial aspects. *Id.*

<sup>106</sup>*Id.*

<sup>107</sup>The author has provided two charts to categorize the various forms of governing law and the practical rules of physician immunity. See *infra* Part VIII.

<sup>108</sup>See *id.* “General statutes” and “specific statutes” are the author’s terminology used to describe the different kinds of statutes dealing with state employee immunity.

<sup>109</sup>See *supra* text accompanying note 108.

courts as in Mississippi or juries as in Michigan.<sup>110</sup> They differ from other states since these courts lay out legal factors for dual agency, which a trier of fact must use to determine whether state immunity applies to each separate set of facts.<sup>111</sup> It is possible that the “Case-By-Case” states could have different fact finders coming to different conclusions on the same set of facts. All other states have set rules of law leading to identical conclusions of immunity for identical sets of facts.<sup>112</sup>

Of the surveyed states, five were governed by “Common Law” immunity, six were governed by “General Statutes,” and seven were governed by “Specific Statutes.”<sup>113</sup> Under the section outlining applicable rules of immunity for dual agency for teaching while treating a private patient section, fifteen states are placed in the “Outside Scope” category, two states are placed in the “Case-By-Case” category and only Ohio is placed in the “Within Scope” category.<sup>114</sup>

From the simple outlook of the chart, Ohio seems to be an extreme minority jurisdiction for applicable dual agency in the *Theobald* context.<sup>115</sup> The question then follows whether the statutory expression, or the root common law, has an effect on the legal application. Statutory comparisons must then be made to determine whether the Tenth District has a definite basis for such an outlying position.

The states categorized as having “Specific Statutes” shall be omitted from any comparison since their statutes are inherently distinct from Ohio statute. A comparison would reveal little about the quality of the *Theobald* decision since specific statutes leave little to judicial interpretation.

#### A. Comparing Ohio and Other “General Statute” States

When looking deeper at the text of the general statutes, a group of states – Ohio, Mississippi, Florida, and Georgia – have similar language for immunity.<sup>116</sup> For instance, these “conventional” general statutes have a pattern of consistency as demonstrated by Georgia’s statute: “[a] *state officer or employee* who commits a tort while acting within the *scope* of his or her official duties or employment is not subject to lawsuit or liability therefore.”<sup>117</sup>

This kind of statute provides immunity generally to “officers” or “employees,” and leaves a more specific determination of whether or not a party qualifies as a state employee to the courts.<sup>118</sup> Additionally, this kind of statute normally only requires that the employee act within the scope of his or her official duties.<sup>119</sup> The courts

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<sup>110</sup>See *infra* Part VIII.

<sup>111</sup>*Id.*

<sup>112</sup>*Id.*

<sup>113</sup>*Id.*

<sup>114</sup>*Id.*

<sup>115</sup>*Id.*

<sup>116</sup>*Id.*

<sup>117</sup>GA. CODE ANN. § 50-21-25(a) (2006) (emphasis added).

<sup>118</sup>*Id.*

<sup>119</sup>*Id.*

again have the ability to spell out what constitutes “within the scope.”<sup>120</sup> Ohio is the lone exception to this, expressly revoking immunity if an “officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.”<sup>121</sup>

Michigan, on the other hand, sets out a specific list of those with immunity: “officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task.”<sup>122</sup> Such a list relies much less on the courts to determine whether or not a party qualifies as a state employee. The Michigan statute further sets out a list of qualifications to be met for immunity:

- (a) The officer, employee, member, or volunteer *is acting or reasonably believes* he or she is *acting* within the *scope* of his or her authority.
- (b) The governmental agency is engaged in the exercise or discharge of a *governmental function*.
- (c) The officer's, employee's, member's, or volunteer's conduct does *not* amount to *gross negligence* that is the proximate cause of the injury or damage.<sup>123</sup>

Those sections of Michigan's statute further distinguish it from the “conventional” general statutes. First, Michigan allows for immunity to apply in situations where the doctor has a reasonable belief of acting within the scope of authority. No other general statute surveyed allows for a “reasonable belief,” so it is likely that the Michigan statute would apply in situations when no other state's statute would. This portion would also give reason for Michigan's immunity determination by jury trial since there is a greater possibility of disputed facts under Michigan's statute. Second, Michigan's statute requires that the state employee or officer be engaged in a “governmental function” during the tortious action. And while governmental function is broadly defined,<sup>124</sup> it may be an issue of limiting immunity that would not occur in the “conventional” general statutes.

The third section of Michigan's statute, requiring that an officer not be grossly negligent, is similar to Ohio's limitation on immunity when an employee acts with a malicious purpose or in a wanton or reckless manner. The Michigan statute even defines “gross negligence” as “so reckless as to demonstrate a substantial lack of concern for whether an injury results.”<sup>125</sup> Thus, recklessness is a common place element between the Ohio and Michigan statutes. For current purposes, however, this similarity has little impact on *Theobald*-like analysis since gross negligence or

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<sup>120</sup>*Id.*

<sup>121</sup>OHIO REV. CODE ANN. § 9.86 (LexisNexis 2006).

<sup>122</sup>MICH. COMP. LAWS § 691.1407(2) (2006).

<sup>123</sup>*Id.* (emphasis added).

<sup>124</sup>“Governmental function” is an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law. Governmental function includes an activity, as directed or assigned by his or her public employer for the purpose of public safety, performed on public or private property by a sworn law enforcement officer within the scope of the law enforcement officer's authority. MICH. COMP. LAWS § 691.1401(f) (2006).

<sup>125</sup>MICH. COMP. LAWS § 691.1407(7)(a) (2006).



recklessness was never alleged. Therefore, the Michigan statute does not have as high a quality in a comparison to the Ohio statute as the “conventional” general statutes.

Louisiana, conversely, does not fit into the group of “conventional” statutes, but its elements are similar. It, like the “conventional” states, requires merely that any employee receiving immunity be “acting within the course and scope of their duties.”<sup>126</sup> The difference between Louisiana and the “conventional” states is that Louisiana’s statute only addresses “state entities which may provide any kind of health care” and those employees who “provid[e] health care in connection with such state entity.”<sup>127</sup> There is no general grant of immunity to all state employees. Despite this fact, the statute is similar enough to the “conventional” general statutes to compare the court’s application since it leaves to the courts to decide the scope of duty.

Accordingly, out of the five statutes that are compared under the general statute section, Ohio allows for practitioner immunity when dually treating a patient and teaching a student. Mississippi has no set law in such a scenario, but generally provides that trial courts use a set of five factors to determine whether or not immunity should attach. Florida, Georgia, and Louisiana provide that a medical practitioner may not receive immunity since he or she has acted outside the scope of his or her employment.

Georgia is quite clear that the relationship with the patient outweighs state duties; thus, no immunity can attach to any malpractice action.<sup>128</sup> Florida holds that the most important factor is that of the relationship between the doctor and patient, and while immunity may be granted if the patient was not a private patient, the doctor-patient relationship outweighs any dual agency with the state.<sup>129</sup> Likewise, Louisiana allows for suit of a private patient in dual agency situations distinguishing the roles of duty owed to the state and those owed to the patient.<sup>130</sup>

Mississippi and Ohio both stray from this common theme. One explanation of this may be that the Mississippi statute states “it shall be a *rebuttable presumption* that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment.”<sup>131</sup> Likewise, Ohio’s statute may set a higher burden by stating an employee does not receive immunity if his actions “were *manifestly* outside the scope of his employment.”<sup>132</sup> The language “manifestly” would require that the actions were “obviously” outside the scope of employment. This may possibly act like the rebuttable presumption and put a higher burden on the party challenging immunity.<sup>133</sup>

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<sup>126</sup>LA. REV. STAT. ANN. § 40:1299.39(A)(1)(a)(i) (2006).

<sup>127</sup>*Id.*

<sup>128</sup>*Keenan v. Plouffe*, 482 S.E.2d 253, 257 (Ga. 1997).

<sup>129</sup>*See Martin v. Drylie*, 560 So. 2d 1285, 1289 (Fla. Dist. Ct. App.1990).

<sup>130</sup>*Landry v. Leonard J. Chabert Med. Ctr.*, 858 So. 2d 454, 464 (La. Ct. App. 2003).

<sup>131</sup>MISS. CODE ANN. § 11-46-7(7) (2006) (emphasis added).

<sup>132</sup>OHIO REV. CODE ANN. § 9.86 (LexisNexis 2006) (emphasis added).

<sup>133</sup>*See* “Manifest,” MERRIAM-WEBSTER ONLINE DICTIONARY, [www.merriam-webster.com/dictionary/manifest](http://www.merriam-webster.com/dictionary/manifest) (last visited Mar. 22, 2007).

However, both the “rebuttable presumption” and “manifest weight of evidence” deal with burdens of proof rather than the scope of employment themselves. Thus, any argument that they would expand the scope to dual agency roles would probably fail. Also, the *Theobald* court’s reasoning does not mention the specific weight given to the word “manifest” so it is assumed that it has little effect on the dual agency decision.

Ultimately, it appears that there is no real distinguishing factor to “justify” why the Tenth District has taken a drastically different approach than the other general immunity statute states. Such evidence supports the argument that *Theobald* was decided wrongly.

#### B. Comparing Ohio and Common Law States

From the onset, it appears important to compare Ohio’s statute and law to those of the common law states. The common law states may represent the ideas that the Ohio legislature tried to codify in section 9.86. Also, the fact that all common law jurisdictions hold practitioners in dual agency are acting outside the scope of state employment could emphasize the divergent path the Tenth District has taken from the conventional grant of immunity.

However, all of the common law restatements either require or emphasize “discretionary acts” of the state employee for receiving immunity, generally known as “governmental discretion.” “Governmental discretion” is defined by situations when an actor must use his or her own judgment in the performance of his functions.<sup>134</sup> It can best be defined by what it is not, which is called a “ministerial duty.” “Ministerial duties” are those performed in a “prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed.”<sup>135</sup> Medical discretion, used during medical care, has been defined within “ministerial duties” by three of the common law states - Missouri, Alabama, and Texas.<sup>136</sup> Thus, a medical practitioner’s failure to meet the standard of care falls outside “governmental discretion” so that immunity does not attach in these jurisdictions.

Two other common law states, Virginia and North Carolina, do not touch on the issue of “governmental discretion” versus “ministerial duties.” Instead, they both simply maintain that practitioners do not receive immunity for their actions with a patient.<sup>137</sup> Virginia is especially animate that medical practitioners not receive immunity stating that a “failure to use such care in the treatment of patients is a violation of their duty to the patients and a departure from a condition of their employment.”<sup>138</sup> Thus, if a practitioner breaches the standard of care, he also breaches his duty to the state, which falls outside the scope of employment.

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<sup>134</sup>Collins v. N.C. Parole Comm’n, 473 S.E.2d 1, 3 (N.C. 1996).

<sup>135</sup>Jackson v. Wilson, 581 S.W.2d 39, 42-3 (Mo. Ct. App. 1979).

<sup>136</sup>*Id.* See also Ex parte Cranman, 792 So. 2d 392, 406 (Ala. 2000); Mussemann v. Villarreal, 178 S.W.3d 319, 320-23 (Tex. App. 2005).

<sup>137</sup>See Urquhart v. Univ. Health Sys. of E. Carolina, Inc., 566 S.E.2d 143, 145 (N.C. Ct. App. 2002); James v. Jane, 282 S.E.2d 864, 870 (Va. 1980).

<sup>138</sup>*James*, 282 S.E.2d at 870.

All of the judicially expressed common law rules differ from section 9.86 of the Ohio Revised Code; therefore, it is inappropriate to compare them to the Tenth District's interpretation.

### C. Conclusion of State Comparisons

The *Theobald* court's reading of section 9.86 should only be compared to those states which have similar general immunity statutes. All other states have far too different base rules to judge the quality of the Tenth District's judicial interpretation. In the context of the similar general statutes, Ohio stands alone in holding that medical practitioners shall receive state employee immunity for dual agency situations involving the treatment of a private patient and education of a student or resident. When Ohio is compared to all other jurisdictions, its outlier status is even more apparent, showing that the holding in *Theobald* is probably "unjustifiable." Ohio has fallen behind both on the separation of principles in dual agency and the significant relationship between a medical practitioner and his patient. This assessment is especially true, considering that *Theobald* actively changed the law and shattered well-settled Ohio precedent.<sup>139</sup>

## V. POLICY ISSUES OF *THEOBALD*

Because courts have been known for making decisions based on policy rather than law, and *Theobald*'s holding lacks strong legal support, it is appropriate to look at policy issues adverse to the benefits of the medical practitioners and medical schools. Here, the greatest effects are the practical effects on plaintiffs bringing a suit similar to *Theobald* and the medical service markets as a whole.

### A. Effect on Forum

Before *Theobald*, a plaintiff who wished to sue her private physician for malpractice merely filed suit in the local Court of Common Pleas. However, due to this decision and section 9.86 immunity, the Court of Common Pleas is no longer the proper venue. Once the defendant has asserted immunity, the plaintiff must now bring the suit to the Court of Claims as it has sole jurisdiction over claims against the state and claims against state employees.<sup>140</sup> Additionally, the Court of Claims has sole jurisdiction to determine whether an "employee" of the State has § 9.86 immunity.<sup>141</sup> Thus, *Theobald* requires all cases in which a medical professional

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<sup>139</sup>See *supra* Part III.

<sup>140</sup>OHIO REV. CODE ANN. § 2743.02(F) (LexisNexis 2006).

<sup>141</sup>*Conley v. Shearer*, 595 N.E.2d 862, 866-67 (Ohio 1992) (holding that jurisdiction to determine immunity of a state employee has been taken away from the common pleas court; Court of Claims now has exclusive jurisdiction to determine this). See also *Johns v. Univ. of Cincinnati Med. Assoc.*, 804 N.E.2d 19, 24 (Ohio 2004) (explaining that the Court of Claims is the only court that may determine immunity for employees; plaintiffs must file in the court within a timely manner under sections 2743.02 and 2743.16); *Clark v. Alberini*, No. 2001-T-0015, 2001 Ohio App. LEXIS 5665 (Ohio Ct. App. Dec. 14, 2001) (holding that no matter what the Court of Claims must always first decide the issue of immunity before a suit may proceed in the Court of Common Pleas). See generally *White v. Bragg*, No. 2001-T-0015, 04-CA-50, 2005 Ohio App. LEXIS 516 (Ohio Ct. App. Feb. 7, 2005); *Cullen v. Ohio Dep't of Rehab. & Corr.*, 709 N.E.2d 583 (Ohio Ct. App. 1998) (stating that the Court of Claims has

treats a patient with observations made by a student or resident to proceed to an immunity determination in the Court of Claims.

Furthermore, plaintiffs should bring all suits to the Court of Claims, even when a defendant has yet to assert state employee immunity, since waiver is extremely difficult to achieve.<sup>142</sup> And while a defendant may contend that she was not a state employee at the time of treatment, such a claim may have little bearing on the outcome of an immunity determination.<sup>143</sup> Plaintiffs' best course of action is staying their proceeding in the Court of Common Pleas until the Court of Claims has made the proper immunity determination.<sup>144</sup>

Therefore, *Theobald* burdens malpractice plaintiffs in their suits against negligent practitioners by forcing them to bring their cases to two separate fora. Furthermore, there is confusion surrounding the procedure that plaintiffs must follow. This leaves outstanding claims susceptible to a dismissal based on semantics rather than reaching the substantive issues of the case.

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sole jurisdiction to determine whether doctors are immune from suit as employees of the State of Ohio).

<sup>142</sup>An affirmative defense may be raised only by (1) expressly using that *defense as part of a pre-pleading Civ. R. 12(B) motion to dismiss*, (2) expressly setting forth that defense in a *responsive pleading* pursuant to Civ. R. 8(C), or (3) by *amending one's responsive pleading* pursuant to Civ. R. 15 so as to include that defense. . . . A failure to utilize any of these three methods for raising an affirmative defense will result in a waiver thereof. (emphasis added). *Spence v. Liberty Twp. Tr.*, 672 N.E.2d 213, 219 (Ohio Ct. App. 1996) (emphasis added). However, direction further provides that "[l]eave of court shall be freely given when justice so requires." OHIO R. CIV. P. 15(A) (2006). This grants such broad leeway for amendments that courts have allowed amended responsive pleadings even after a case has begun its trial phase. *Leibson v. Ohio Dep't of Mental Retardation & Dev. Disabilities*, 618 N.E.2d 232, 238 (Ohio Ct. App. 1992). Therefore, waiver may not take effect until a judgment has been entered. Additionally, if the parties expressly or impliedly consent to go forward as if an affirmative defense had been asserted, then no pleading whatsoever shall be required by the court. OHIO R. CIV. P. 15(B) (2006). Finally, Ohio appellate districts are split on whether or not a general pre-pleading 12(b)(6) motion to dismiss for failure to state a claim preserves the right to assert immunity after judgment has been entered, even when the 12(b)(6) motion is not explicit on its face that immunity exists. *Spence*, 672 N.E.2d at 217-18. The Fourth district has stated a general 12(B)(6) will not preserve an immunity defense, whereas the Twelfth and Eighth districts have allowed the preservation. *Id.* Therefore, even after judgment, waiver *may* still be asserted. *Id.*

<sup>143</sup>*Theobald v. Univ. of Cincinnati*, 827 N.E.2d 365, 372 (Ohio Ct. App. 2005) (stating "[n]either Nurse Parrott's admission that she was not an UC employee nor her testimony that she was not compensated by UC is dispositive of her employment status"), *aff'd*, 857 N.E.2d 573 (Ohio 2006).

<sup>144</sup>Authority for granting a stay found in *Walker v. Steinbacher*, 523 N.E.2d 352, Syllabus of the Court (Ohio Ct. App. 1987). The Syllabus states in its entirety: "[w]hen state employees are sued in their official and individual capacities in the court of common pleas, the court should stay proceedings until the Court of Claims determines whether the defendants' conduct was outside the scope of their employment because it was malicious, in bad faith, wanton or reckless. The court of common pleas may not grant an 'interlocutory order of dismissal' pending the Court of Claims' determination of the applicability of the statutory immunity provided by R.C. 9.86 and 2743.02(A)(1); the better practice is for the court to stay proceedings upon such terms as are appropriate." *Id.*

### B. Effect on Damages Recoverable

Most disturbing about *Theobald* is its limitation of damage awards for plaintiffs who suffer harm due to medical malpractice. While the state itself is liable when immunity is granted, there are greater limitations on damages recoverable in suits against the state than medical practitioners in their private capacity. One may speculate whether the decision was politically motivated to both reduce the total recovery of plaintiffs and to ease the burden of malpractice insurance for private doctors.<sup>145</sup>

In any case, the controlling cap on damages has changed from section 2323.43 of the Ohio Revised Code, limiting medical malpractice awards, to section 3345.40, limiting awards against the state.<sup>146</sup> While both caps (1) allow full recovery on economic damages, (2) generally act to limit non-economic damages to \$250,000, and (3) do not apply to suits brought for wrongful death under chapter 2125 of the Ohio Revised Code, there still exists a profound disparity in granting exceptions.<sup>147</sup> Specifically, section 3345.40 provides for a \$250,000 cap on claims against the State of Ohio for non-economic or “non-actual loss” with *no exceptions*. Such “non-actual losses” include: “fees paid or owed to an attorney . . . pain and suffering, for the loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education of an injured person, for mental anguish, or for any other intangible loss.”<sup>148</sup>

Likewise, section 2323.43 explicitly includes in its non-economic recovery list most of the losses from the “non-actual loss” list in section 3345.137.<sup>149</sup> However, section 2323.43 allows for recovery of non-economic damages greater than \$250,000 in certain situations. First, a plaintiff may recover non-economic damages up to three times the amount of economic damages, not exceeding \$350,000 for a plaintiff or \$500,000 for each occurrence.<sup>150</sup> In this way, the \$250,000 cap acts to limit large scale non-economic damage awards where actual loss is low since any awards exceeding \$83,333 in economic damages will be exempted from the \$ 250,000 cap.

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<sup>145</sup>The political push for medical malpractice reform has been well documented; most notably the push comes from President Bush who has proposed a cap of \$250,000 for non-economic damages. CNN.com, *Bush Outlines Medical Liability Reform*, <http://www.cnn.com/2003/ALLPOLITICS/01/16/bush.malpractice/> (last visited Mar. 22, 2007); Jeffrey Birnbaum & John Harris, *President's Proposed Remedy to Curb Medical Malpractice Lawsuits Stalls*, WASH. POST, Apr. 3, 2005, at A05, available at <http://www.washingtonpost.com/wp-dyn/articles/A21931-2005Apr2.html>; GOP.com - Republican National Committee, *Legal Reform*, <http://www.gop.com/Issues/Legal Reform/> (last visited Mar. 22, 2007).

<sup>146</sup>OHIO REV. CODE ANN. § 2323.43 (LexisNexis 2006) (listing the generally applicable cap on damages for economic and non-economic damages in medical claim). Section 3345.40 limits the damages for claims against the State. OHIO REV. CODE ANN. § 3345.40 (LexisNexis 2006). Since doctors receive immunity, all malpractice claims covered by *Theobald* must be brought against the State of Ohio. § 2323.43(G)(1).

<sup>147</sup>OHIO REV. CODE ANN. §§ 3345.40(B)(3), 2323.43(A)(2)-(3), (G)(3) (LexisNexis 2006).

<sup>148</sup>*See id.* § 3345.40(A)(2)(b).

<sup>149</sup>OHIO REV. CODE ANN. § 2323.43(H)(3) (LexisNexis 2006).

<sup>150</sup>*See id.* § 2323.43(A)(2).

Section 2323.43 also grants a second exception where a plaintiff may recover up to \$500,000 of non-economic loss or \$1 million for all plaintiffs in an occurrence if the plaintiff suffers either: “(a) [p]ermanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system; [or] (b) [p]ermanent physical functional injury that permanently prevents the injured person from being able to independently care for [him]self and perform life sustaining activities.”<sup>151</sup> Thus, section 2323.43 takes into account the severity of the outcome from malpractice and attempts to “make the plaintiff whole” through monetary means. section 3345.40 makes no such exception.

In *Theobald*, if Mr. and Mrs. Theobald had been able to sue together under section 2323.43, the general malpractice statute, they would have been able to receive up to \$1,000,000 in non-economic damages due to Mr. Theobald’s permanent loss of the use of his arms and eyes.<sup>152</sup> The Tenth District’s decision, however, took away their right to recover that amount by placing them under the \$250,000 inflexible cap of section 3345.40. By removing upwards of \$750,000 of compensation for severe loss caused by medical malpractice, this ruling demonstrates the real impact on real people. Therefore, the *Theobald* ruling unfortunately deprives malpractice victims of a significant amount of recovery to be “made whole” through monetary compensation.

### C. Economic Effects on Medical Services Market

Besides the more practical effects of *Theobald*, this case may also have burdensome consequences on the medical services market. If so, this would demonstrate that further policy considerations oppose the court’s holding, much like the practical considerations. Foremost, this opinion removes all economic incentive that would otherwise provoke greater care on the part of private medical practitioners and, thus, better care for patients. Additionally, it creates a heavy burden on the State to compensate loss for the negligence of these doctors.

First, when courts hold doctors and other medical practitioners liable for medical malpractice, a practitioner’s insurer will usually cover the cost of litigation and judgment against the doctor. The insurer’s cost subsequently relies on the negligence of the insured because more suits will lead to greater cost to defend the insured and more judgments against practitioners, which are paid by the insurer. The insurer in turn passes that cost on to the insured practitioners, charging greater insurance premiums for higher risk insureds.

The *Theobald* ruling directly reduces costs for insurers of practitioners who qualify for immunity because a large portion of claims against their insureds will now be immune from suit. This could lead to insurers cutting insurance rates for private practitioners that will receive immunity. For instance, if an insurer takes a survey and determines that one doctor will have a student with him for half of his patients, his liability insurance premiums could be reduced by half since he is half as likely to be liable.

Further, if an insurer, when determining insurance premiums, does not take account for claims against the State due to a particular doctor’s negligence while

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<sup>151</sup>See *id.* § 2323.43(A)(3).

<sup>152</sup>See *id.* § 2323.43(A)(3); *Theobald v. Univ. of Cincinnati*, 827 N.E.2d 365, 368-69 (Ohio Ct. App. 2005), *aff’d*, 857 N.E.2d 573 (Ohio 2006).

immune, there will be no economic disincentive for malpractice of the immune doctor. That specific doctor could be negligent in dealing with fifty percent of his patients and, as long as students or residents are present for treatment, he will suffer no adverse consequences financially. Removal of the disincentive could then lead to increased negligence because doctors have less reason to follow the standard of care, consequently leading to worse services provided to consumers. Particularly, these physicians may attempt riskier treatment of a patient when following the standard of care would work just as well.

And while some may argue that the doctors' fear of consumer response in demand markets will create the necessary economic disincentive to balance off the elimination of liability disincentive, a free market economist will point out that the medical services market has artificial restrictions, thus, restricting supply and limiting competition.<sup>153</sup> Since the American Medical Association, through political influence, has been successful in efforts to control the amount of new doctors entering the practice of medicine, competition suffers and market incentive arguments fail because there is a fixed supply of doctors with a limited amount of time to treat patients.<sup>154</sup> Even if a free market would allow consumers to completely reject a particular physician's services, the necessity of treatment and scarcity of supply would make a broad-based rejection of physicians affected by *Theobald* impractical.

Also, many consumers of medical services are not sophisticated in researching doctors to know their history of malpractice.<sup>155</sup> And even if a consumer is sophisticated, most "lay" people see medical malpractice plaintiffs as guilty of bringing a frivolous claim until proven otherwise.<sup>156</sup> This point of view prevents

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<sup>153</sup> "[T]he American Medical Association and other industry groups have predicted a glut of doctors and worked to limit the number of new physicians. In 1994, the *Journal of the American Medical Association* predicted a surplus of 165,000 doctors by 2000." Dennis Cauchon, *Medical Miscalculation Creates Doctor Shortage*, USA TODAY, Mar. 3, 2005, at 1A, available at [http://www.usatoday.com/news/health/2005-03-02-doctor-shortage\\_x.htm](http://www.usatoday.com/news/health/2005-03-02-doctor-shortage_x.htm). The number of doctors is a political decision, heavily influenced by doctors themselves. *Id.*

<sup>154</sup> Dale Steinreich, Ludwig von Mises Institute, *100 Years of Medical Robbery*, June 10, 2004, available at <http://www.mises.org/story/1547> (citing MILTON FRIEDMAN, CAPITALISM AND FREEDOM 152 (University of Chicago 1982) (1962)).

<sup>155</sup> Andrea Stephenson, *Medical Information on the Internet*, <http://www.floridahealthstat.com/publications/fhcj/stephenson.htm> (last visited Oct. 10, 2006) (discussing the fact that elderly need medical information the most, but have the least sophistication to get that information on the internet, where most information is posted). See also Lorraine S. Wallace, *The Impact of Limited Literacy on Health Promotion in the Elderly*, 2 CALIFORNIAN J. HEALTH PROMOTION 1 (2004), <http://www.csuchico.edu/cjhp/2/3/01-04-wallace.pdf> (last visited Oct. 10, 2006) (discussing limited literacy of elderly consumers).

<sup>156</sup> "According to Dr. Ellen Leggett of the Leggett Jury Research, their database reflects that one-third of jurors nationally believe that the people who file medical malpractice cases are looking for easy money; two-thirds believe that plaintiff lawyers pressured patients into filing malpractice suits; many believe that malpractice cases are driving up their medical insurance rates, and half of the jurors believe that malpractice cases are ruining the health care system in this country." Howard L. Nations, *Overcoming Jury Bias*, 11 MEDICAL MALPRACTICE: LAW & STRATEGY 1 (1992), available at <http://www.howardnations.com/overcomingjurybias/OJB.pdf> (last visited Mar. 22, 2007).

most perspective patients from considering malpractice suits when choosing a doctor, thereby, making “market correction” improbable. Furthermore, many patients choose their physicians, or other medical service providers, through referrals or assignment in times of urgency. In these situations, the patient relies on the referral. Such reliance makes it *less likely* that the average consumer of medical services would conduct an investigation of the new practitioner’s background and end the relationship.

Lastly, with Ohio’s overwhelming budget deficit, estimated to be in the \$1 billion range for 2006, the court disregarded the burden these malpractice actions place on society.<sup>157</sup> The extra cost for the state will deprive budgetary funding from other areas that society may deem worthier than a negligent physician, such as education, public transportation, preventative medical treatment, relief money for economically deprived areas. Therefore, this ruling negatively affects consumer markets and general society. The court should have considered these factors in making its decision.

## VI. CONCLUSION

The Tenth District’s opinion in *Theobald* seems to have little support, either in the trends of the State of Ohio or in conventional interpretation of a statute similar to Ohio’s section 9.86. Further, while such legal “justification” may be unnecessary if a policy interest so commands, there exists strong policy interests opposing the expanding role of state employee immunity in medical malpractice suits. Plaintiffs not only must deal with procedural complications, but also lose out on the chance to recover up to \$750 million more than if the suit was against a medical practitioner in his private capacity. Additionally, the patients of the State of Ohio may receive a lesser quality of health care due to the removal of the economic disincentive. Any reduction in the standard of care that may occur is too much when patients’ lives are at stake. Finally, the already burdened state budget will now have to bear an added weight; consequently, harming some other state program, which helps people who are not wealthy medical practitioners. In light of these implications, review and reversal of *Theobald* is proper.

## VII. EPILOGUE

On December 13, 2006, the Supreme Court of Ohio issued an opinion on the Theobalds’ appeal from the Tenth District.<sup>158</sup> The Court affirmed the lower court’s decision, granting immunity to medical practitioners, based on section 9.86 of the Ohio Revised Code, *anytime* they treat a patient as long as they act in a *dual role* to “teach” an “involved” student or resident.<sup>159</sup>

In its analysis, the court only discussed the issue of whether the “individual [medical practitioners] act[ed] within the scope of employment when the cause of action arose.”<sup>160</sup> Like the appellate court, the Supreme Court of Ohio reviewed past

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<sup>157</sup>Pamela M. Prah, *Billion-Dollar Deficits Greet Several Statehouses*, Stateline.org, <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15928> (last visited Oct. 10, 2006).

<sup>158</sup>*Theobald v. Univ. of Cincinnati*, 857 N.E.2d 573 (Ohio 2006).

<sup>159</sup>*Id.*

<sup>160</sup>*Id.* at 577.



cases on medical practitioner dual agency, noting that the old “financial factor” test had been eroded since the advent of the “educational factor” in *Norman*.<sup>161</sup> It then agreed with the Tenth District’s implementation of the “educational factor” test as the only test for whether a practitioner had acted in the scope of employment since “the question of scope of employment must turn on what the practitioner’s duties are as a state employee and whether the practitioner was engaged in those duties at the time of an injury.”<sup>162</sup> It then concluded that a medical practitioner employed by the state to teach, who is teaching a student or resident at the time of malpractice, shall receive state employee immunity.

The dissent argued that due to the great burden this rule places on plaintiffs, requiring simultaneous suits in the Court of Claims and Common Pleas, the appellate court should have been overturned and immunity not granted. The dissent then challenged the claim that a practitioner is in fact teaching when a student is merely present in the room:

[D]octors are busy professionals, often called upon to make irreversible decisions of the utmost magnitude with little time for reflection, and they make mistakes. When they do, whether they are immune from liability should not depend solely on whether a student is present. Teaching by osmosis is not the same as talking a resident through an operation. The mere presence of a student does not establish that instruction is taking place.<sup>163</sup>

The dissent then moved onto policy issues of cost-shifting and the lack of a jury trial. For cost-shifting, it argued that it would likely saddle the state with many judgments, yet not reduce insurance premiums because insurance companies “cannot know in advance whether any future negligence will occur in the presence of a student.”<sup>164</sup> It then argued that the constitutional right to a jury trial was disturbed by this decision, forcing more cases to the Court of Claims, where there is no jury trial.<sup>165</sup>

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<sup>161</sup>*Id.* at 579.

<sup>162</sup>*Id.* at 580.

<sup>163</sup>*Id.* at 581-82.

<sup>164</sup>*Id.* at 582.

<sup>165</sup>*Id.* at 583.

VIII. APPENDIX: PHYSICIAN IMMUNITY CHARTS<sup>166</sup>

## A. Governing Law of Immunity

Governing Law of Immunity		
Common Law	Statutory – General	Statutory - Specific
<b>Alabama</b> Restatement grants immunity to “agent” when: (1) formulating policy; (2) exercising judgment in the administration of a government agency; (3) discharging duties imposed on an agency and prescribed by statute; (4) enforcing criminal laws; or (5) discharging statutory duties relating to releasing prisoners, counseling persons of unsound mind, or educating students. <sup>167</sup>	<b>Ohio</b> “Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.” <sup>168</sup>  “‘Officer or employee’ means []: A person who, at the time a cause of action against the person arises, is serving in an elected or appointed office or position with the state or is employed by the state.” <sup>169</sup>	<b>Colorado</b> “‘Public employee’ includes [] [a]ny health care practitioner employed part-time by and holding a clinical faculty appointment at a public entity as to any injury caused by a health care practitioner-in-training under such health care practitioner's supervision. Any such person shall maintain the status of a public employee when such person engages in supervisory and educational activities over a health care practitioner-in-training at a nonpublic entity if said activities are within the course and scope of such person's responsibilities as an employee of a public entity.” <sup>170</sup>

<sup>166</sup>See *supra* text accompanying note 108.

<sup>167</sup>Ex parte Rizk, 791 So. 2d 911, 913 (Ala. 2000).

<sup>168</sup>OHIO REV. CODE ANN. § 9.86 (LexisNexis 2006).

<sup>169</sup>OHIO REV. CODE ANN. § 109.36(A)(1)(a) (LexisNexis 2006). The statute specifically names doctors as *de jure* employees in certain instances, but does not do so in this case. *Id.*

<sup>170</sup>COLO. REV. STAT. § 24-10-103(4)(b)(II) (2006).

<p><b>Texas</b>  “Ordinarily, public officials must show the following elements to establish a defense of official immunity:  (1) the performance of a discretionary function,  (2) in good faith, and  (3) within the scope of the employee's authority.”<sup>171</sup></p>	<p><b>Mississippi</b>  “An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee shall be held personally liable for acts or omissions occurring within the course and scope of the employee's duties.”<sup>172</sup></p> <p>“[I]t shall be a rebuttable presumption that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment.”<sup>173</sup></p> <p>“‘Employee’ means any officer, employee or servant of the State of Mississippi or a political subdivision of the state, including elected or appointed officials and persons acting on behalf of the state or a political subdivision in any official capacity, temporarily or permanently, in the service of the state or a political subdivision whether with or without compensation.”<sup>174</sup></p>	<p><b>New Jersey</b>  “[A] public employee is liable for injury caused by this act or omission to the same extent as a private person.”<sup>175</sup></p> <p>“Except for an examination or diagnosis for the purpose of treatment, neither a public entity nor a public employee is liable for injury caused by the failure to make a physical or mental examination, or to make an adequate physical or mental examination, of any person for the purpose of determining whether such person has a disease or physical or mental condition that would constitute a hazard to the health or safety of himself or others. For the purposes of this section, ‘public employee’ includes a private physician while actually performing professional services for a public entity as a volunteer without compensation.”<sup>176</sup></p>
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<sup>171</sup>Mussemann v. Villarreal, 178 S.W.3d 319, 323 (Tex. App. 2005) (citing Kassen v. Hatley, 887 S.W.2d 4, 9 (Tex. 1994)).

<sup>172</sup>MISS. CODE ANN. § 11-46-7(2) (2006).

<sup>173</sup>§ 11-46-7(7).

<sup>174</sup>MISS. CODE ANN. § 11-46-1(f) (2006). Like Ohio, this statute specifically names doctors as *de jure* employees in certain instances, but does not do so in this case. *Id.*

<sup>175</sup>N.J. STAT. ANN. § 59:3-1(a) (West 2006).

<sup>176</sup>N.J. STAT. ANN. § 59:6-4 (West 2006).

<p><b>Missouri</b>          “The Missouri rule is in line with the general run of authority that a public officer charged with discretionary duties is not liable for a mistake of judgment or an erroneous performance of said duties unless he be guilty of willful wrong in relation thereto, but that as to ministerial duties he is liable for the violation or neglect thereof to the party injured thereby and that a mistake of judgment does not excuse him.”<sup>177</sup></p>	<p><b>Florida</b>          “No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function.”<sup>178</sup></p>	<p><b>Oklahoma</b>          “Physician faculty members and staff of the University of Oklahoma Health Sciences Center and the College of Osteopathic Medicine of Oklahoma State University not acting in an administrative capacity or engaged in teaching duties are not employees or agents of the state.”<sup>179</sup></p>
<p><b>North Carolina</b>          “As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability.”<sup>180</sup></p>	<p><b>Georgia</b>          “A state officer or employee who commits a tort while acting within the scope of his or her official duties or employment is not subject to lawsuit or liability therefore.”<sup>181</sup></p>	<p><b>Illinois</b>          “The state statutorily grants immunity on a limited basis, it has been argued that the following section should apply to doctors:          “[A] public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abuse.”<sup>182</sup></p>

<sup>177</sup>Jackson v. Wilson, 581 S.W.2d 39, 42-43 (Mo. Ct. App. 1979). Ministerial Functions are defined as “of a clerical nature which a public officer is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed.” *Id.* at 43.

<sup>178</sup>FLA. STAT. § 768.28(9)(a) (2006).

<sup>179</sup>OKLA. STAT. tit. 51, § 152(5)(b) (2006).

<sup>180</sup>Collins v. N.C. Parole Comm’n, 473 S.E. 2d 1, 7-8 (N.C. 1996) (quoting Smith v. State, 222 S.E. 2d 412, 430 (N.C. 1976)).

<sup>181</sup>GA. CODE ANN. § 50-21-25(a) (2006).

<sup>182</sup>745 ILL. COMP. STAT. 10/2-2001 (2006).

<p><b>Virginia</b> In determining whether a state-employed physician is entitled to the protection of sovereign immunity, a court must apply a four-factor test consisting of: “(1) the nature of the function performed by the employee, (2) the extent of the state's interest and involvement in that function, (3) the degree of control exercised by the state over the employee, and (4) whether the alleged negligent act involved the use of judgment and discretion.”<sup>183</sup></p>	<p><b>Michigan</b> “[E]ach officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met: (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority. (b) The governmental agency is engaged in the exercise or discharge of a governmental function. (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.”<sup>184</sup></p> <p>“This act does not grant immunity to a governmental agency or an employee or agent of a governmental agency with respect to providing medical care or treatment to a patient, except medical care or treatment provided to a patient in a hospital owned or operated by the department of community health.”<sup>185</sup></p>	<p><b>Wisconsin</b> “No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.”<sup>186</sup></p>
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<sup>183</sup>McCloskey v. Kane, 604 S.E.2d 59, 61 (Va. 2004) (citing James v. Jane, 282 S.E.2d 864, 869 (Va. 1980)). Generally, Virginia's statutes provide for specific times for immunity; when outside of the statute, a common law approach applies. *Id.*

<sup>184</sup>MICH. COMP. LAWS § 691.1407(2) (2006).

	<p><b>Louisiana</b></p> <p>“‘State health care provider’ or ‘person covered by this Part’ means: The state or any of its . . . universities, facilities, hospitals, clinics, [] health care units, ambulances, [] university health centers, and other state entities which may provide any kind of health care whatsoever, and the officers, officials, and employees thereof when acting within the course and scope of their duties in providing health care in connection with such state entity.”<sup>187</sup></p> <p>“[T]he state shall pay any damages, interest, cost of investigation and defense, and any other costs in connection with any claim lodged against any state health care provider for an alleged act of medical malpractice. . . . The coverage provided herein shall apply only when the state health care provider is acting within the terms of the definition of ‘state health care provider. . . .’”<sup>188</sup></p>	<p><b>Minnesota</b></p> <p>“Any claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.”<sup>189</sup></p>
		<p><b>Tennessee</b></p> <p>“State officers and employees are absolutely immune from liability for acts or omissions within the scope of the officer's or employee's office or employment, except for willful, malicious, or criminal acts or omissions or for acts or omissions done for personal gain.”<sup>190</sup></p>

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<sup>185</sup> § 691.1407(4).

<sup>186</sup> WIS. STAT. § 893.80(4) (2006).

<sup>187</sup> LA. REV. STAT. ANN. § 40:1299.39(A)(1)(a)(i) (2006).

<sup>188</sup> § 40:1299.39(g).

<sup>189</sup> MINN. STAT. § 466.03 Subd. 6 (2006).

<sup>190</sup> TENN. CODE ANN. § 9-8-307(h) (2006).

*B. Applicable Rule of Immunity When Teaching Through Treatment and Dual Agency with Private Organization*

Outside Scope	Case-By-Case	Within Scope
<p><b>Florida</b> In one case similar to <i>Theobald</i>, the court overruled a granting of summary judgment based on physician immunity since there was a factual dispute as to his function at the time of the surgery, including whether or not any physicians-in-training assisted in the procedure.<sup>191</sup> Further, the court stated that the critical issue in determining immunity is that of the relationship between the doctor and patient, in reference to the supervision of another doctor or direct treatment of the patient.<sup>192</sup> Immunity is probably not available here under the circumstances in <i>Theobald</i>.</p>	<p><b>Mississippi</b> Five factors are offered to determine immunity: 1. the nature and function performed by the employee; 2. the extent of the state's interest and involvement in the function; 3. the degree of control and direction exercised by the state over the employee; 4. whether the act complained of involved the use of judgment and discretion; and 5. whether the physician receives compensation, either directly or indirectly, from the patient for professional services rendered.<sup>193</sup> Immunity is determined by the trial court. Courts have held the state has an interest in having a ready pool of candidates, so in most cases, a doctor is probably immune.<sup>194</sup> However, these cases do not discuss dual agency where the medical practitioner receives payment from a private patient.</p>	<p><b>Ohio</b> <i>Theobald's</i> Rule: "[A] practitioner is acting within the scope of his employment if he educates a student or resident by direct instruction, demonstration, supervision, or simple involvement of the student or resident in the patient's care."<sup>195</sup> Also, the relationship between the patient and doctor does not matter at all; this includes the private patients of the doctor.<sup>196</sup></p>

<sup>191</sup> *Martin v. Drylie*, 560 So. 2d 1285, 1288-1289 (Fla. Dist. Ct. App. 1990).

<sup>192</sup> *Id.* at 1289.

<sup>193</sup> *Mozingo v. Scharf*, 828 So. 2d 1246, 1250 (Miss. 2002) (citing *Miller v. Meeks*, 762 So. 2d 302 (Miss. 2000)).

<sup>194</sup> *Sullivan v. Washington*, 768 So. 2d 881, 882 (Miss. 2000).

<sup>195</sup> *Theobald v. Univ. of Cincinnati*, 827 N.E.2d 365, 377 (Ohio Ct. App. 2005).

<sup>196</sup> *Id.*

<p><b>Georgia</b> The physician's duty to the patient is independent from his official state duties and he is still under a duty to treat the patient with a reasonable degree of care and skill,<sup>197</sup> even to the extent where a patient signs a form acknowledging that the procedure will take place at a teaching hospital and that students and observers will be present for educational purposes.<sup>198</sup></p>	<p><b>Michigan</b> Jury determination is necessary on whether the agency with the state is dissolved through service to a private master.<sup>199</sup> Michigan maintains that an employee could be deemed to be acting for two masters simultaneously.<sup>200</sup></p>	
<p><b>Virginia</b> "[I]mplicit in the employment by the University of Virginia of physicians to teach in its Medical School and to attend patients in its Hospital, is the understanding that they will use reasonable care in the performance of their duties. A failure to use such care in the treatment of patients is a violation of their duty to the patients and a departure from a condition of their employment."<sup>201</sup></p>		
<p><b>Alabama</b> The Supreme Court of Alabama has stated that employees such as doctors who use "medical discretion" do not receive immunity.<sup>202</sup> Also, supervising doctors have been held liable for their acts and omissions in supervising residents.<sup>203</sup></p>		

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<sup>197</sup>Keenan v. Plouffe, 482 S.E.2d 253, 257 (Ga. 1997).

<sup>198</sup>*Id.*

<sup>199</sup>Vargo v. Sauer, 576 N.W.2d 656, 666 (Mich. 1998).

<sup>200</sup>*Id.* at 665.

<sup>201</sup>James v. Jane, 282 S.E.2d 864, 870 (Va. 1980).

<sup>202</sup>Ex parte Cranman, 792 So. 2d 392, 406 (Ala. 2000) (holding that doctors treating students at a state university health center are not entitled to immunity).

<sup>203</sup>Hauseman v. Univ. of Ala. Health Serv. Found., 793 So. 2d 730, 736 (Ala. 2000).



<p><b>Texas</b> Doctors using medical discretion to treat patients are not entitled to immunity.<sup>204</sup> Additionally, “supervising the medical decision-making of less-experienced doctors, along with determining when to consult more-experienced physicians, are the exercise of medical discretion.”<sup>205</sup></p>		
<p><b>Tennessee</b> A physician would receive immunity if he does not act in a private capacity, and students or residents participate in the treatment. However, if the doctor privately bills a patient, there is no immunity.<sup>206</sup></p>		
<p><b>Oklahoma</b> Whenever treating a patient, a faculty physician is acting outside the scope of his or her employment with the state.<sup>207</sup></p>		
<p><b>Louisiana</b> Courts have held doctors may be held personally liable in negligent supervision of a medical intern in treating patients; thus, there is no immunity.<sup>208</sup> The court separated the negligence of the intern being supervised and the negligence of the doctor in supervision. Also, statute requiring the state to bear the cost of defending a “public employee” will not prevent the public employee from being sued in his private capacity, nor be accounted for there within.<sup>209</sup></p>		

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<sup>204</sup>Mussemann v. Villarreal, 178 S.W.3d 319, 326 (Tex. App. 2005).

<sup>205</sup>*Id.*

<sup>206</sup>Hayden v. Waller, No. 02A01-9511-BC-00241, 1996 Tenn. App. LEXIS 867, at \*21 (Tenn. Ct. App. 1996).

<sup>207</sup>Nelson v. Pollay, 916 P.2d 1369, 1376 (Okla. 1996).

<sup>208</sup>Landry v. Leonard J. Chabert Med. Ctr., 858 So. 2d 454, 464 (La. Ct. App. 2003).

<sup>209</sup>*Id.* at 461.

<p><b>Colorado</b> Following the statute, whenever a doctor supervises a resident-in-training, he is immune.<sup>210</sup> The statute also discusses educating along with supervising, and no cases explore this further. This could very well mean mere involvement, however, probably not since it says “supervising and educating,” so, supervising would be required. Also, this will most likely only apply for supervising residents since the statute explicitly names “residents-in-training.”</p>		
<p><b>Missouri</b> A doctor acts in a ministerial function when treating a patient; thus, he never gets immunity.<sup>211</sup> By not exercising the sovereign's power in treating patients, a doctor acts the same as if he was in private practice.<sup>212</sup></p>		
<p><b>Wisconsin</b> Medical discretion does not get immunity; it is considered “ministerial.”<sup>213</sup> Only when the conduct involves the determination of fundamental governmental policy and is essential to the realization of that policy is where the immunity is applied.</p>		
<p><b>Illinois</b> Every doctor owes his patient the duty of ordinary care; immunity will only be granted for acts such as administrative or legislative duties.<sup>214</sup></p>		

<sup>210</sup> Sereff v. Steedle, No. 03CA1445, 2005 Colo. App. LEXIS 1291, \*\*8-10 (Colo. Ct. App. 2005).

<sup>211</sup> Jackson v. Wilson, 581 S.W.2d 39, 43 (Mo. Ct. App. 1979).

<sup>212</sup> Cooper v. Bowers, 706 S.W.2d 542, 543 (Mo. Ct. App. 1986).

<sup>213</sup> Gordon v. Milwaukee County, 370 N.W.2d 803, 806 (Wis. Ct. App. 1985); Protic v. Castle Co., 392 N.W.2d 119, 122 (Wis. Ct. App. 1986), *superseded by statute*, WIS. STAT. § 893.82 (2006), *as recognized in* Daily v. Univ. of Wis., 429 N.W.2d 83 (Wis. Ct. App. 1988); Walker v. Univ. of Wis. Hosp., 542 N.W.2d 207, 212-213 (Wis. Ct. App. 1995).

<sup>214</sup> Jenkins v. Lee, 807 N.E.2d 411, 413 (Ill. 2004).

<b>North Carolina</b> A doctor sued for malpractice does not receive immunity, regardless of his employment with the state. <sup>215</sup>		
<b>New Jersey</b> Courts have held that the statute “immunizes only the public-health activities of physicians and expressly approves of liability for treatment of patients;” thus, doctors do not receive immunity for treatment of patients at anytime. <sup>216</sup>		
<b>Minnesota</b> Medical practitioners employed by the state are not entitled to official immunity. <sup>217</sup>		

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<sup>215</sup>Urquhart v. Univ. Health Sys. of E. Carolina, Inc., 566 S.E.2d 143, 145 (N.C. Ct. App. 2002). This is further evidenced by the case of *Jones v. Pitt County Memorial Hosp., Inc.*, 410 S.E.2d 513 (N.C. Ct. App. 1991). In the case, a suit was brought against the East Carolina University School of Medical, eight doctors who were faculty members at the medical school and on staff at the hospital, and seven residents-in-training. *Id.* at 514. The medical school was the lone defendant to be dismissed on grounds of immunity. *Id.* at 513-14. This shows that faculty members probably were not able to receive immunity in dual agency and possibly even that residents-in-training do not receive immunity.

<sup>216</sup>Willis v. Ashby, 801 A.2d 442, 444 (N.J. Super. Ct. App. Div. 2002).

<sup>217</sup>Terwilliger v. Hennepin County, 561 N.W.2d 909, 913-14 (Minn. 1997).